Supreme Court, U.S.
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No. 06-187

In the Supreme Court of the United States

WILSON W. WILSON, et al.,
Petitioners,

v.

STATE FARM FIRE AND CASUALTY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit found that the District Court erred in finding that State Farm failed to carry its burden of proof that Christel Fontenot was guilty of setting the subject fire.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent State Farm Fire and Casualty Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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SUMMARY OF REASONS TO DENY THE PETITION

Petitioner has presented no "compelling reasons" for this Petition for Writ of Certiorari to be granted. *See Sup. Ct. Rule 10.* Specifically, Petitioner seeks only a review of the Fifth Circuit's opinion that the District Court's findings of fact were clearly erroneous. The Fifth Circuit also found error in the legal standard applied by the District Court, but Petitioner makes no objection to that in the present Petition.

The Petition is purely factual and the trial record offers substantial support for the Fifth Circuit's holding that the District Court was clearly erroneous in ruling that State Farm did not carry its burden of proof that Christel Fontenot started this arson fire. Indeed, the factual record provides overwhelming evidence that the Opinion of the Fifth Circuit is correct.

Accordingly, Petitioner has failed to demonstrate any compelling reasons for the Court to grant the Petition.

STATEMENT OF THE CASE

On Monday, July 17, 1995, a fire caused substantial damage to a dwelling located at 9024 Staring Court in Baton Rouge, Louisiana, which dwelling was insured by State Farm. It was undisputed that the fire was intentionally set. The following is a summary of the evidence presented at trial to support State Farm's defense that Christel Fontenot started the fire.

A. Background of the Fontenots

Christel Fontenot and Martin Fontenot owned the house for about 17 years, before the fire. By 1995, they had been married for 29 years and had five sons; Marty, age 25, Brodi, age 18, Arloe, age 17, Jacques, age 14 and Nigel, age 11. At the time of the fire, only Arloe, Jacques and Nigel remained residents of the household.

Christel Fontenot had been a school teacher and librarian until 1993. Martin Fontenot was an environmental engineer with a large chemical company, near Baton Rouge, and he taught graduate chemistry courses on the university level, in his spare time.

About ten years before the fire, Christel Fontenot was diagnosed with a bi-polar disorder which involved alternating periods of depression and manic behavior. Those undesirable highs and lows are controlled by the drug Lithium, which was prescribed for Mrs. Fontenot. While taking that medication, Mrs. Fontenot did well as a school teacher and mother. She was employed as a school teacher/librarian until the end of the school year in 1993. At that point and several times before, she simply refused to take her Lithium and her behavior deteriorated. She did not work during the

1993/1994 and 1994/1995 school years. When depressed, she became withdrawn at home, exerting little effort to care for her sons. During manic periods, she was hyperactive and engaged in excessive spending. That situation was aggravated by the fact that Martin Fontenot was required by his company to travel extensively. The oldest son Marty testified that he and his younger brothers basically were "fending for themselves."

Martin Fontenot's efforts to get his wife to comply with the drug therapy were unsuccessful. He sought assistance in counseling through his priest, her siblings and his company's Employee Outreach Program. He took other steps which failed. He asked that his wife be committed in the year before the fire, but that request was refused by the Coroner, when Mrs. Fontenot assured the Coroner that she would resume taking her Lithium.

Martin Fontenot testified that he made the decision to end the marriage in 1995. He had a family conference with his sons and moved out of the house on July 7, 1995, ten days before the fire. At that time, he packed his clothes and told his wife that he would be filing for a divorce. It was the first time that he had taken that action.

B. The Fontenots' Activities Before the Fire

Arloe Fontenot testified that his mother acted in a number of strange ways after his father moved out on July 7th. She started burning paper in the back yard, which she had not done before. He was concerned and asked her not to burn any of his stuff. She started parking on the street or in the driveway, instead of her usual place in the garage. When Arloe asked her why, she responded that there was too much gasoline in the garage.

For some time, Martin Fontenot had planned a trip to Texas with his three youngest sons. Arloe had been invited to visit to the campus of Texas A&M University in College Station, Texas. Mr. Fontenot planned to combine that visit by taking his sons to see their older brother Brodi Fontenot, who was attending the University of Houston, and to visit Astroworld. They intended on leaving Sunday morning, July 16th, since Arloe had a baseball game on that Saturday.

On Friday, July 14th, a Deputy Sheriff attempted to serve Christel Fontenot with the divorce suit from her husband. Arloe and his brothers were playing basketball in their driveway when the Deputy arrived. Mrs. Fontenot had left to run some errands. In her absence, the Deputy waited outside, talking with Arloe; but he left before Mrs. Fontenot arrived. When Mrs. Fontenot returned, Arloe informed her that a Deputy had stopped by "with papers from Daddy."

On Sunday morning, Mr. Fontenot departed for Houston with his three sons, as planned. Arloe visited Texas Tech on Monday. They received a message late Monday evening that the fire occurred, then they returned on Tuesday.

After her sons departed on Sunday morning, Christel Fontenot began ripping up the carpet in the master bedroom in small strips, first using scissors and then a knife. As the strips of carpet were pulled off the floor, Mrs. Fontenot carried them to the street during the day. Mrs. Fontenot spent the night at the house that Sunday night. On Monday morning, the pile of carpet was removed by garbage collectors.

During the day on Monday, Mrs. Fontenot continued to pull up and remove strips of carpet from the master bedroom. She also spread newspaper throughout the house, taping it to

the walls and stuffing it under doors in some rooms. Mrs. Fontenot later explained that she did not like the carpet and wanted to replace it, but she had not obtained replacement floor covering. She also admitted that she did not have the money to purchase new carpet and her husband had quit giving her money. Mrs. Fontenot explained that the spreading of newspaper in the house was to keep the dust down created by removal of the carpet in the master bedroom, but fire department investigator Gary Newman testified that the newspaper was spread throughout the house, not just near the door to the bedroom. Her son Marty testified that his mother had never damaged the house or its furnishings before that weekend. Martin Fontenot also testified that his wife had not damaged the house like that before that time.

Before departing the house on the evening of the fire, Christel Fontenot removed framed photographs and portraits of family members and herself from the walls of the residence. She also removed a number of loose family photographs. She removed these from the house to her car. At the second trial, she first denied that family photographs were taken, then admitted the fact after being confronted by her testimony in her sworn statement. Mrs. Fontenot also filled a box with numerous personal papers, including her teaching records, family and financial documents. She packed clothes and she loaded beverages into a cooler. These things she also removed from the house to her vehicle. Finally, she also removed two of her three jewelry boxes. Then, she locked the house and departed in her vehicle a few minutes before the fire was reported to 911. Mrs. Fontenot admitted these actions in her sworn statement three weeks (8/8/95) after the loss, confirming the observations of investigator Gary Newman and son Marty on the night of the fire.

Mrs. Fontenot testified that her destination upon leaving that evening was to visit friends Mary and Jim Billip in Destrehan. However, she admitted that they did not know she was coming. She had not called them, or told anybody else of her excursion. She did not know how to get to the Billips' house and still does not. She admits she never got to Destrehan that evening. She testified that she drove down Airline Highway only to turn around and drive back. She then checked into a motel in Baton Rouge rather than going home.

C. Time of Mrs. Fontenot's Departure

The Baton Rouge Fire Department received the report of this fire at 6:36 p.m. on July 17, 1995. In her sworn statement on August 8, 1995, Mrs. Fontenot testified that she left the house "after around 12:00" following a light lunch of "cheeses and stuff."

Witness Dede Earl talked to Christel Fontenot at the insured residence about 15-20 minutes before the fire was reported. Ms. Earl had received a call from the Fontenots' oldest son Marty, who lived in Natchez. He had been trying to reach his mother all day, but she would not answer the phone. So, he called his friend Dede Earl and asked that she go by the house to check on her, before going to her evening class at Louisiana State University. ("L.S.U."). At the time, Ms. Earl was dating Marty's best friend, whose family lived next door to the Fontenots. They were also out of town.

The time of Ms. Earl's visit is well-defined since her class started at 6:30 p.m. Ms. Earl testified that she pulled into the Fontenot's driveway. She knocked and rang the doorbell several times before Christel Fontenot finally appeared. Ms. Earl testified that Mrs. Fontenot looked to be doing house

work. Ms. Earl thought she looked fine and asked Mrs. Fontenot to answer her son's call from Natchez at 7:00 p.m.

Ms. Earl then went next door to her boyfriend's house to feed their dog, and returned to her car in the Fontenot driveway, before departing for the L.S.U. campus. At trial, Ms. Earl estimated that the time of her departure from the Fontenots' was around 6:15 p.m. because she usually drove pretty fast and she arrived on campus right before the class started.

Shortly after the fire, Ms. Earl gave a recorded statement to investigator David Chemin of the Baton Rouge Fire Department. At that time, Ms. Earl estimated that she departed the Fontenots at about 6:20 p.m. that evening.

Arthur Fabre testified that he also spoke to Christel Fontenot within twenty to thirty minutes before the fire. Mr. Fabre had been a neighbor and friend of the Fontenots for many years. Mr. Fontenot had asked him to feed his horses that were kept on a lot at the rear of the Fontenots' property, during his absence in Texas. The time of his arrival and departure are not as well-fixed as that of Dede Earl. He thinks he got there at 6:05-6:10 p.m. He knocked and, after some delay, Mrs. Fontenot came to the door. When he passed the house after feeding the horses, Mrs. Fontenot's car was gone. He then walked to his house which was down the street. Minutes later, he was in his front yard, chatting with a friend, when another neighbor pulled up and reported seeing smoke at the Fontenot house. Mr. Fabre called 911, then he ran to the Fontenot house and tried to fight the fire with a garden hose.

D. The Fire Investigation

Gary D. Newman testified that he was Associate Chief Fire Investigator for the Baton Rouge Fire Department in July, 1995. He was qualified at trial as an expert in the field of determining the origin and cause of fires.

Mr. Newman testified that he was requested to investigate the Fontenot dwelling while the firefighters were putting it out. Upon his arrival, he noticed carpet in the front yard. After the fire was mostly extinguished, he walked through the house and observed a number of things that he considered "unusual." He noticed that pictures were missing from the walls of the house. He also noticed that newspaper was spread and taped in numerous places in the house. He further testified that newspaper was found in six different rooms on the first floor. At the time, he suspected that the newspaper was spread out in the house with somebody's intention "to spread fire from one area to the other," which he referred to as "trailers."

Mr. Newman testified that he identified the master bedroom closet as the area of origin of the fire. It was his opinion that the fire was intentionally set. Mr. Newman further testified that he confirmed with the initial firefighters that the house was locked and secured upon their arrival at the fire and they saw no signs of forced entry before they responded.

Mr. Newman interviewed Christel Fontenot in her attorney's office a few days after the fire. At that time, Mrs. Fontenot informed Mr. Newman that she had locked the house upon her departure the evening of the fire and that only she, her children and Mr. Fontenot had keys to the house.

She admitted spreading the newspapers in the house and cutting out the carpet.

Mr. Newman also testified that no one was at home the evening of the fire, when firefighters arrived. Neighbors told him that Mr. Fontenot was in Houston with his children and that one of the older children was on their way from Natchez. Mr. Newman spoke to him (Marty) when he arrived from Natchez. Marty Fontenot brought it to Mr. Newman's attention that two of the three jewelry boxes that his mother usually kept in her vanity had been taken out and the Marty stated more than once, "I can't believe my mother burned the house up . . ." Marty also told Mr. Newman that he had asked Dede Earl to check on his mother. Ms. Earl was interviewed the following week by David Chemin, another investigator with the Baton Rouge Fire Department.

Mr. Newman concluded that the fire was set by Christel Fontenot and he issued a warrant for her arrest. Concerning his opinion, he testified as follows:

A. "Knowing the overall circumstances, we were aware that we could place Mrs. Fontenot in the home for just a few minutes before the fire was turned in, knowing that the fire would probably burn a few minutes before it was observed and turned in because it was in the interior of the house, in a closet, in a bedroom. So we know it burned a little while."

Q. Can you estimate how long it burned before it would have been observed?

A. "I think it would be hard to say, but I would have to say 8, 10 minutes, just depending. I mean, I

> have seen houses burn a good while and nobody called it in, so maybe before the smoke was actually seen outside then when did somebody see it to turn in."

Mr. Newman further testified, "I know that Mrs. Fontenot was there 5 to 10 minutes before the fire was turned in." He testified that that time frame was provided by Dede Earl's recorded statement and that the fact that the house had been found locked played a large part in his opinion. He further testified that his investigation yielded no evidence that Martin Fontenot or anyone else, other than Christel Fontenot, was responsible for setting the fire.

Robert M. Finley testified that he was assigned to investigate the Fontenot claim in 1995, as a State Farm claims representative. At trial, Mr. Finley summarized the reasons that he concluded that the fire was set by Christel Fontenot. He testified that at the conclusion of his investigation, he denied the entire claim, pursuant to Louisiana law and the language of the State Farm policy. However, he testified that he negotiated a settlement with Martin Fontenot, Sr. after the claim was denied, which involved full payment for his interest in the property and that of his children, which payments were the subject of the Stipulation at the beginning of the trial. Mr. Finley testified that the decision was made to settle and pay Mr. Fontenot's claim, because State Farm felt that there was absolutely no evidence that Mr. Fontenot was involved in causing the loss and that it was the right thing to do.

At the conclusion of its investigation, State Farm paid Martin Fontenot $81,356.97 and made payoffs to the two mortgagees on the house totaling $32,995.06.

E. Christel Fontenot's Motives

At trial, plaintiff called two Monroe psychiatrists, who began treating Mrs. Fontenot about six months after the fire. They testified that she was not inclined to criminal behavior or property damage as a result of her bi-polar disorder.

State Farm never argued that Mrs. Fontenot's bi-polar disorder was the reason this fire occurred. People commonly do uncharacteristic things during times of stress. Mrs. Fontenot is no different. It is common knowledge that divorce, death, unemployment and financial problems are among life's greatest stressors, and, it is not surprising that Christel Fontenot acted in a very unusual manner in the 10 days between the time of her husband's departure and this fire.

Arloe Fontenot testified that his mother was burning fires in the backyard after his father left, which she had not done before. Arloe Fontenot also testified that his mother began parking on the curb at the street and in the driveway, rather than the garage. Her son asked her why and she responded that he should not park in the garage either, because "that was too much gasoline too close to the house." Arloe also testified that she had never acted like that before.

Mrs. Fontenot's activity cutting up and removing carpet in the master bedroom also offers dramatic evidence of her upset over the impending divorce. At the same time, she spread newspaper throughout the house, which the Fire Department noted with interest. So, when she left that Monday evening, the floor in her bedroom was mostly concrete and newspaper was everywhere. Marty Fontenot testified that his mother had never damaged the house like that before.

As her psychiatrists and family reported, Mrs. Fontenot's activities in burning fires, parking away from the house and ripping out carpet was not her typical behavior. It began when her husband left and continued until the time immediately before this fire occurred, according to her children.

At trial, plaintiff's counsel attempted to paint the picture that Christel Fontenot was unaware of the divorce suit when the fire occurred, so there was no reason for her to be upset. It is undisputed that she was not formally served with the suit until three days after the fire, but it is also clear that she knew it was coming. Martin Fontenot testified that he told her that he would be filing the divorce suit. More importantly, Arloe Fontenot testified that a Sheriff's Deputy was at the house the Friday before the fire to serve his mother, who was running errands, and that he told his mother upon her return that a Deputy Sheriff had been there to give her "papers from Daddy." At the second trial, Ms. Fontenot admitted that her son told that to her, but she allegedly thought the deputy's visit was to sell her fund-raising tickets. It was not a credible story.

In addition to the emotional distress of the divorce, Mrs. Fontenot was presented with financial pressures as well. She had been the librarian at Scotlandville Magnet High School during the school year of 1992-1993, but she did not work in 1994 or 1995. Irresponsible spending had been one of the manifestations of her bi-polar disorder. Martin Fontenot testified at trial that she had surreptitiously applied for and obtained credit cards in 1994, on which she was not making payments. She attempted to hide these debts from him by disposing of the bills. Arloe Fontenot testified that he fielded calls from collectors harassing her for payment. Those financial pressures would obviously have been aggravated by

the divorce from her husband, especially if he gained custody of their three sons. At trial, Ms. Fotenot testified that her husband was not giving her any money to support herself or take care of the house.

The trial evidence also showed that Christel Fontenot was aware of the claims process with State Farm. In 1994, she reported the theft of her wedding rings to State Farm. Her story was that she had been working in the garden and realized that they were missing, so she surmised that they had been stolen. State Farm paid the claim. Notably, Mrs. Fontenot kept it a secret from her husband. At trial, Martin Fontenot testified that he retrieved the mail one Saturday and that there was a letter from State Farm about the earlier payment on the claim. Before that, he had not even been told that his wife had lost any jewelry or that she had filed an insurance claim and received payment.

F. Acts of Preparation - Compelling Proof

One of the most incriminating items of proof in an arson case is evidence that an insured removed personal items of economic and sentimental value shortly before the fire occurred.

Before leaving minutes before the fire was reported, Christel Fontenot took her jewelry boxes and placed them in her car. She also loaded another box with numerous items of sentimental value. The firemen noticed that several picture hangers were bare on the walls of the Fontenot home when they first entered to fight the fire. Confronted with this, Mrs. Fontenot admitted in her sworn statement that she had removed pictures of herself and her family that were hanging on the walls and placed them in a box which she took with her. She also testified that she took her teacher notes and a

number of other personal papers. She had a change of clothes, a hat, a jacket and a cooler with drinks, too.

In her sworn statement, she admitted that the day of the fire was the first time that she had ever taken jewelry from her house when going for a drive. She also admitted that it was the first time that she had ever taken family pictures and valued documents for a drive. At trial, she also admitted that she never before stayed at a motel when her husband and children were gone. She also admitted that she was left at home numerous times when Mr. Fontenot took his sons hunting in Mamou. Plaintiffs offered no reasonable explanation for that very peculiar behavior immediately before the fire. State Farm urges the Court to see that there is no sensible explanation for Mrs. Fontenot taking those valued personal items, except to purposefully save them from the fire.

G. Actions After The Fire

Christel Fontenot did not return home from her drive that evening. She checked into the Shoney's Inn in Baton Rouge. She did not go back to the house the next morning when she woke up. That odd behavior presents a clear picture of someone who is avoiding a very uncomfortable situation.

Plaintiff's counsel argues that it was just a coincidence that she happened to spend the night away from the house the night of the fire. A neighbor Clara Washington was called at trial to say that Mrs. Fontenot told her on one prior occasion before that she had spent the night in a motel when her husband and children were out of town, though she could offer no details. In her sworn statement, Mrs. Fontenot was asked if she had ever stayed in a motel before on one of her drives. She answered coyly: "I may have." At trial, she

admitted that it was never done before. Ms. Fontenot's rationale for staying away from the house also strains credibility. She claimed that she did not return home because it was dark; but she acknowledged that she stayed the previous night alone in the house, as she had many times before.

Her behavior the next morning was also very suspicious. Marty and his wife Danielle began calling motels the next morning when they had not seen or heard from his mother. After several calls, they tried Shoney's Inn and Marty's wife was put through to her room. At that time, Christel Fontenot said, "I am not ready yet," and hung up. Danielle tried again and Mrs. Fontenot simply picked up the receiver and hung up the phone without saying anything. At trial, Mrs. Fontenot offered the explanation that she thought the motel office was calling to fix her toilet.

Marty Fontenot's testimony about his mother's arrival at the fire scene is also noteworthy. She said, "My house, my house," and he asked her, "Mom, what happened?" She would not answer and he asked her again several times. At trial, he testified that he was angry. It was obvious that it bothered him that she would not talk to him about the cause of the fire. A few minutes later, she reported to have chest pains and she was taken to the hospital where she was examined and released.

APPLICABLE STATE LAW

On the arson defense, the standard is well-settled in Louisiana law, which applies in this diversity case. The insurer has the burden to show that the fire was of an incendiary origin and that an insured was responsible for it. Rist v. Commercial Union Insurance Company, 376 So.2d 113 (La. 1979). The burden is to prove the defense by a **preponderance of evidence**. Sumrall v. Providence Washington Ins. Co., 60 So.2d 68 (La. 1952); Rist, supra; Farace v. Independent Fire Insurance Company, 699 F.2d 204 (5 Cir., 1983). Additionally, the insurer may prove its arson case entirely with circumstantial evidence. Sumrall, supra; Rist, supra; Farace, supra; Viviano v. Travelers Ins. Co., 533 F. Supp. 1 (La. E.D., 1981); Christensen v. State Farm Mutual Auto Ins. Co., 552 So.2d 1377 (La. App. 5 Cir., 1989).

In arson trials, there is also a shift in the burden of proof in Louisiana law. Once the insurer presents prima facia proof that the fire was incendiary and that an insured was responsible, the plaintiff is then required to offer convincing evidence that a named insured is not to blame. Rudison v. Michigan Millers Mutual Ins. Co., 152 So.2d 407 (La. App. 1 Cir., 1963); Swindle v. Maryland Casualty Co., 251 So.2d 787 (La. App. 1 Cir., 1971); cert denied 259 So.2d 217 (1971); Christensen, supra; Briggs v. New Hampshire Indem. Co., 579 So.2d 1221 (La. App. 3 Cir., 1991).

The evidence and testimony in this case fully support the Fifth Circuit's finding that the District Court erred in ruling that State Farm failed to meet its burden of proof that Christel Fontenot was responsible for intentionally causing the fire to her home.

MISSTATEMENT OF FACT BY PETITIONER

There is no record that the criminal charge of arson against Petitioner was dismissed for insufficient evidence. In fact, the charge was dismissed due to a failure by the District Attorney's Office to subpoena witnesses, after being called for trial twice.

REASONS FOR DENYING THE PETITION

Based on the foregoing evidence, the Fifth Circuit reversed the decision of the District Court, finding that State Farm not only met its initial burden of proof in regard to the arson defense, but also that the circumstantial evidence was so strong that there was no other reasonable explanation for the fire. Based on the facts of this case, such a finding is clearly correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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